Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

JACK THOMAS, PETITIONER

v.

JOHN HASSLER, CARLETON REID, AND
REID RICHARDS & MIYAGI, A LAW PARTNERSHIP

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAI'I

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Where A Disputed Material Fact Existed and Where Competent and Admissible Evidence Confirmed the Appearance of The Arbitrator's Partiality, Did the Hawaii Supreme Court Err in Confirming the Trial Court's Summary Judgment in Violation of Petitioner's Right to Jury Trial?

B. Should This Court Resolve the Conflict Among the Hawai'i Supreme Court, Ninth Circuit Court of Appeals and Eleventh Circuit Court of Appeals in the Standard Applicable to Review of An Arbitration Decision for Evident Partiality?

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OPINIONS BELOW

The unpublished Order Denying Motion for Reconsideration entered by the State of Hawai'i Supreme Court in *Thomas v. Hassler, et al.* (S.C. NO. 25475) filed September 18, 2006, denying Petitioner's Motion for Reconsideration. Appendix, ("App." at 1a-2a).

The unpublished Summary Disposition Order of the State of Hawai'i Supreme Court in *Thomas v. Hassler* (S.C. NO. 25475) filed August 30, 2006, and reported at 140 P.3d 1033, 111 Hawai'i 253 (Haw. 08/30/2006) denying the Plaintiff-Appellant's appeal from the October 23, 2002 Final Judgment of the Circuit Court of the Third Circuit of Hawai'i (Civil No. 98-218); (App. at 3a-15a).

The unpublished Final Judgment of the State of Hawai'i Circuit Court of the Third Circuit, *Thomas v. Hassler* (Civil No. 98-218), adjudicating all parties and claims, entered October 23, 2002, ordering Final Judgment in favor of Defendants and against Plaintiff as to all claims raised by Plaintiff; (App. at 16a-17a).

The unpublished written decision and Order Granting Defendants John Hassler, Carleton Reid and Reid, Richards & Miyagi's Motion for Summary Judgment filed June 12, 2002 of the State of Hawai'i Circuit Court of the Third Circuit, *Thomas v. Hassler* (Civil No. 98-218), filed October 23, 2002 granting the Respondents' Motion for Summary Judgment; (App. at 18a-19a).

The unpublished written decision in memorandum form of the State of Hawai'i Circuit Court of the Third

Circuit dated August 23, 2002 in *Thomas v. Hassler* (Civil No. 98-218) stating findings and conclusions in support of the trial court's grant of summary judgment in favor of Respondents; (App. at 31a-47a).

JURISDICTION

A. Basis for this Court's Jurisdiction.

The State of Hawai'i Supreme Court's Order Denying Motion for Reconsideration was filed September 18, 2006. Petitioner had sought reconsideration of the Hawai'i Supreme Court's Summary Disposition Order filed August 30, 2006, which Order affirmed, *inter alia*, grant of summary judgment by the trial court on a challenge to an arbitration decision on grounds of arbitrator partiality. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

The Circuit Court of The Third Circuit ("trial court") improperly granted Respondents John Hassler, Carleton Reid, and Reid Richards & Miyagi ("Respondents") Motion for Summary Judgment as to all claims, where there were factual issues in dispute concerning the effect of the relationship between Respondents and Arbitrator Walter Davis, including non-disclosure of multiple years of payments totaling $650,000.00 to the Arbitrator from Respondent Reid Richards & Miyagi.

The dispute about the Arbitrator's partiality arose after Arbitrator Davis' decision arose post-arbitration when Mr. Thomas learned of the previous payments to Mr. Davis. Mr. Thomas presented

competent and admissible evidence to the trial court that he would not have agreed to proceed with Mr. Davis as the Arbitrator in his case had he known of the payments before or during the arbitration.

On October 23, 2002, the Circuit Court entered Final Judgment against Mr. Thomas, granting summary judgment for Respondents. (App. at 16a-17a). On August 30, 2006, the Hawai'i Supreme Court entered its Summary Disposition Order denying Mr. Thomas' appeal. (App. at 3a-15a). On September 18, 2006, the Hawai'i Supreme Court entered its Order Denying Motion for Reconsideration (App. at 1a-2a).

Petitioner Thomas asserts that the trial court erred in its rulings and that the Hawai'i Supreme Court erred in refusing to set aside the trial court's grant of summary judgment and in denying Petitioner's Motion for Reconsideration.

This Petition for Writ of Certiorari is filed within 90 days of the date of the Hawai'i Supreme court's denial of Petitioner's timely Motion for Reconsideration. 28 U.S.C. § 2101(c); Supreme Court Rule 13.3.

RELEVANT PROVISIONS INVOLVED

See Appendix.

STATEMENT

On June 1, 1988, Jack Thomas was struck by a pickup truck driven by Peter S. Capriotti, Jr., while walking across the parking lot of McDonald's Restaurant in Wailuku, Hawai'i.[1] Colonial Penn Insurance Company, insurer for the truck driver, hired the law firm of Davis Reid & Richards to defend against Mr. Thomas' injury claims. On October 23, 1992, Mr. Thomas filed a Complaint entitled *Thomas v. Capriotti*, Civil No. 92-0733, in the Second Circuit Court of the State of Hawai'i. On August 26, 1994, Mr. Thomas filed an Amended Complaint, adding Colonial Penn as a defendant.

In February, 1996, the parties agreed to arbitration limiting Mr. Thomas' recovery against Capriotti to the $100,000.00 insurance policy limit in exchange for a first-party bad faith claim against Colonial Penn. An agreement to arbitrate was entered into on February 23, 1996. The agreement negotiated by the parties mandated a $200,000.00 minimum floor and $3,000,000.00 maximum judgment, to take into account the potential bad faith claims. Walter Davis was agreed upon as arbitrator. During this period, Respondent Reid was still counsel of record for Colonial Penn.

The true extent of Mr. Davis' affiliation with the Reid firm was not disclosed to Mr. Thomas. Payments

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[1] The facts presented in this Statement are stated in the trial court's memorandum of decision dated August 23, 2002 in support of its grant of summary judgment in favor of Respondents; (App. at 31a-47a).

to Mr. Davis of $650,000.00 paid over a period of five years from the Reid law firm until December 31, 1993 were hidden. Based upon later discovered evidence presented in the trial court challenge to the arbitration decision, it appeared that Mr. Davis remained a partner with the Reid firm until 1990 or 1992. Respondent Reid testified that some of the monies paid to Mr. Davis between 1992 and 1994 were monies that were earned by the Reid firm on the Thomas case.

Both Respondents Reid and Hassler led Mr. Thomas to believe that there was no professional or financial relationship between Arbitrator Davis and Respondent Reid and his firm after 1989. Mr. Thomas had been specifically told that, although Mr. Davis had previously been a partner of Respondent Reid, Mr. Davis was not affiliated with the firm when Mr. Thomas' case was being handled by the firm, and was specifically told that Mr. Davis had no financial connection with the firm after 1989.

The arbitration began on March 25, 1996 and concluded in April, 1996. On or around April 26, 1996, Plaintiff asked Respondent Hassler if Respondent Reid and Arbitrator Davis were still partners in 1990 and 1991 and if money had passed from Reid to Davis during the period 1991 to 1996. Respondent Hassler did not disclose that Respondent Reid and Davis were partners in 1990 and 1991 when Colonial Penn retained Defendant Reid and his firm and that Davis received money from Respondent Reid Richards and Miyagi and/or Respondent Reid after 1991.

On or about July 2, 1996, Mr. Thomas received a final arbitration award of $101,000.00 general damages

plus interest and costs. Arbitrator Davis declined to find Colonial Penn in bad faith. Following the arbitration decision, Mr. Thomas first discovered that Respondent Hassler's representations that no partnership or financial relationship between Respondent Reid Richards & Miyagi and Arbitrator Davis after December 31, 1989 were false. The truth, if known, would have caused Mr. Thomas to refuse to arbitrate his case with Mr. Davis.

In the trial court, Mr. Thomas raised the issue of his reliance on the Respondents' representations. In his affidavit in support of his memorandum in opposition to Respondents' motion for summary judgment, Mr. Thomas stated that, had he known the true particulars of the relationship between Respondent Reid Richards & Miyagi and Arbitrator Davis, he would never have consented to Mr. Davis' service as arbitrator.

In the Hawai'i Supreme Court, Mr. Thomas again raised the issue of his reliance on the Respondents' representations that Respondent Reid Richards & Miyagi and Arbitrator Davis had no partnership or financial relationship after December 31, 1989. Plaintiff-Appellant's [Jack Thomas] Opening Brief in *Thomas v. Hassler, et al.* (S.C. NO. 25475) filed March 23, 2004, pp. 28-33 in original. Mr. Thomas raised issues of fundamental fairness. His claims are grounded in the right to jury determination of disputed factual issues and due process and equal protection guaranteed by the 5th and 14th amendments to the U.S. constitution.

The Hawai'i Supreme Court specifically criticized Respondents Hassler and Reid for failing to disclose information to the Court, as required by Hawai'i Rules of Professional Conduct, Rules 3.1, 3.3, and 3.4. Nevertheless, it granted Mr. Thomas no relief.

REASONS FOR GRANTING THE PETITION

A. The Trial Court's Grant of Respondents' Motion for Summary Judgment Violates the Standards Established By this Court Where Disputed Issues of Fact are for a Jury to Decide.

1. Standard for Summary Judgment

Summary judgment may only be granted where the record demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Hawai'i Rules of Civil Procedure Rule 56(c).[2] A party moving for summary judgment must demonstrate that viewing the record in the light most favorable to the non-moving party, there is no evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); accord, *GECC Financial Corp. v. Jaffarian*, 79 Hawai'i 516, 521, 904 P.2d 530, 535 (Haw. App. 1995), modified on other grounds, 80 Hawai'i 118, 905 P.2d 624 (1995) (burden is on moving party "to show

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[2] Hawai'i's Rules of Civil Procedure are patterned on the F.R.Civ.P. and federal court decisions interpreting same are highly persuasive in Hawai'i's courts when construing their own rules. *Ellis v. Crockett*, 51 Haw. 45, 61, 451 P.2d 814, 824 (1969).

the absence of any genuine issue as to all material facts, which entitle them to judgment as a matter of law.")

2. Standard for Appellate Review

In Hawai'i, the standard for appellate review of a trial court's grant of summary judgment is *de novo*, i.e., the reviewing court will apply the same standard as the trial court. *Amfac, Inc. v. Waikiki Beachcomber Inv. Co.*, 74 Haw. 85, 104, 839 P.2d 10, 22, (1992) reconsideration denied, 74 Haw 650, 843 P.2d 144 (1992).

3. Viewing the Evidence in Favor of Mr. Thomas, The Hawai'i Supreme Court Should Have Vacated Summary Judgment Because The Issue of Mr. Thomas' Reasonable Reliance on Respondents' Representations Regarding the Extent of Their Relationship With Arbitrator Davis Required Determination by a Jury.

Amendment VII to the U.S. Constitution provides for the right to a jury trial. (App. at 20a). Similarly, Article 1, § 13 of the Hawai'i Constitution provides for a jury trial in suits at common law where the value in controversy exceeds five thousand dollars.

Where, as here, a party's reasonable reliance or state of mind is in factual dispute, summary judgment cannot be properly granted. See, e.g., *Wayne v. Yamamoto*, 2 Haw. App. 176, 628 P.2d 634 (1981). Such conclusion comports with this Court's decision in

Anderson v. Liberty Lobby, 477 U.S. 242, 243 (1986) (summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.) At the summary judgment stage, the trial judge's function is not himself to weigh the evidence.

The Hawai'i Supreme Court erred in determining that a reasonable person could not have relied on later-discovered evidence that Arbitrator Davis had a broader and longer relationship with Respondents than Respondents disclosed. Respondents never submitted any evidence to rebut Mr. Thomas' statements under oath that he relied on Respondents' inadequate representations Nevertheless, the Court treated Mr. Thomas' reliance as irrelevant, reasoning that Mr. Thomas would not have been able to avoid his agreement to arbitrate on such basis. The Court gave short shrift to Mr. Thomas' contention that he would have not consented to Mr. Davis as the arbitrator had he known the true scope of the relationship. The Court opined:

> ...[H]ad Thomas not consented to Davis as the arbitrator... [a]t most, it would have led to the selection of a different arbitrator. Therefore, Thomas's claim for damages on the issue of Davis's relationship with the Appellees appears to be grounded in the notion that, with a different arbitrator, Thomas would have received a more favorable arbitration award.

Hawai'i Supreme Court Summary Disposition Order in *Thomas v. Hassler* filed August 30, 2006 (unpublished) reported at 111 Hawai'i 253, 140 P.3d 1033 at p. 7 in original; (App. at 3a-15a.)

At the time of the arbitration hearing in 1996, Hawai'i Revised Statutes § 658-9(2) provided in part that: "... the court may make an order vacating...[an arbitration] award ...[w]here there was evident partiality... in the arbitrators, or any of them..."[3] Accordingly, the Hawai'i arbitration scheme in effect when this case arose resonated with the fundamental fairness guarantee contained in the due process clause of the 5th Amendment to the U.S. constitution, applicable to the states under the 14th Amendment. The substitution of a non-judicial process, i.e. arbitration, for judicial fact-finding and decision may not abrogate this guarantee.

B. The Hawai'i Supreme Court Erred In Holding That Mr. Thomas' Discovery of Post-Arbitration Evidence of the Arbitrator's Partiality Cannot Serve as a Basis for Vacating the Arbitration Award.

In the present case, the Hawai'i Supreme Court considered Arbitrator Davis' lack of knowledge of his former law firm's continuing involvement in the arbitration proceedings prevented Mr. Thomas from

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[3] In 2001, the Legislature of the State of Hawai'i enacted H.R.S. ch. 658A (Uniform Arbitration Act), replacing H.R.S. ch. 658 (Arbitration and Awards). See Appendix for the texts of the applicable replacement statutes. The substantive basis for vacating an arbitration award for evident partiality was unchanged.

raising a genuine issue of material fact sufficient to defeat summary judgment for Respondents. The Court bootstrapped its determination by concluding that, because Mr. Davis had not been selected as the arbitrator at the time Mr. Thomas signed the agreement to arbitrate his claims, misrepresentations concerning Mr. Davis' relationship with the Reid firm were wholly irrelevant to Mr. Thomas' decision to arbitrate. In his un-rebutted Affidavit filed August 1, 2002 in the trial court in support of his memorandum in opposition to Respondents' motion for summary judgment, however, Mr. Thomas asserted that he would not have consented to Mr. Davis' selection had he known the true extent of the relationship between Mr. Davis and his former firm.

In its application of an unduly restrictive standard for proof of an arbitrator's evident partiality, the Hawai'i Supreme Court's decision conflicts with the standard applied in *Schmitz v. Zilveti*, 20 F. 3d 1043, 1046-1047 (9th Cir 1994). In *Schmitz*, appellants challenged an arbitration award entered in the United States District Court in Hawai'i on the ground of evident partiality under 9 U.S.C. § 10(a)(2). On facts markedly similar to those in this case, after the award was entered, the appellants discovered previously undisclosed legal representation of a parent company of one of the opposing parties by the law firm of one of the arbitrators. The district court held that an arbitrator is bound to disclose only those facts of which they are aware at the time of the hearing.

In reversing, the Ninth Circuit Court of Appeals relied on this Court's decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S.

145 (1968) reh'g denied 393 U.S. 1112 (1969). The Circuit Court held that in circumstances such as exist in this case, an arbitrator has a duty to investigate potential conflicts and may not simply rely on known facts to avoid a determination of evident partiality.

The rationale of the state court decision for which review is sought here shares the same approach to evident partiality as that made by the Eleventh Circuit Court of Appeals. In *Gianelli Money Purchase v. ADM Investor Services* 146 F.3d 1309 (11th Cir. 1998), the Eleventh Circuit Court of Appeals explicitly rejected the approach adopted in *Schmitz*. In *Gianelli*, the Eleventh Circuit Court of Appeals limited challenges to arbitration awards to those circumstances in which an actual conflict exists or an arbitrator knows, but fails to disclose, information that would lead a reasonable person to believe that a potential conflict exists. 146 F.3d at 1312. The Court of Appeals specifically excused the arbitrator from investigating past contacts. *Id.* Thus, the *Gianelli* holding is at odds with the holding of the Ninth Circuit Court of Appeals in *Schmitz*. Equally if not more important, *Gianelli* elides the due process foundation of this Court's decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.*

Commonwealth emphasized that the necessity of an impartial arbitrator is no less a constitutional principle than the necessity of an impartial judge. 393 U.S. at 148. Indeed, this Court declared that, if anything, the impartiality of arbitrators should be even more scrupulously safeguarded by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible

bias. 393 U.S. at 149 (emphasis added); accord *Tumey v. State of Ohio*, 273 U.S. 510 (1927) (14th Amendment due process prohibits a trial before a tribunal financially interested in the result of its decision). It is not enough for an arbitrator to disclose the nature of those relationships with parties of which he or she is aware. Due process can only be satisfied where an arbitrator investigates the extent of relationships which may give rise to an appearance of bias.

This principal of fundamental fairness – due process is at the heart of the matter here. Mr. Thomas explicitly raised this point of error before the Hawai'i Supreme Court in his motion for reconsideration filed September 8, 2006, at p. 8 thereof. The same fairness challenge infused Mr. Thomas' Affidavit filed August 1, 2002 in the trial court in support of his memorandum in opposition to Respondents' motion for summary judgment and was reasserted on appeal.

This high court should crystallize the evident partiality standard by which challenges to the fairness of arbitration decisions. The standard as applied by the Ninth Circuit Court of Appeals in *Schmitz* comports with the constitutional rights and expectations of contesting parties; the standard employed by the Eleventh Circuit Court of Appeals in *Gianelli* and mirrored here by the Hawai'i Supreme Court does not.

CONCLUSION

Unless corrected, the Hawai'i Supreme Court's decision deprives Petitioner Thomas of his constitutional due process right to a fair and honest hearing. Moreover, the right to equal protection requires this Court to resolve the conflicting standards of gauging an arbitrator's evident partiality among the Circuit Courts of Appeal. Otherwise, more persons similarly situated to Petitioner will suffer their own deprivations, again without remedy.

For these reasons and the facts and arguments presented above, Petitioner respectfully request that this Court issue a Writ of Certiorari and consider the issues raised here.

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No. 25475

SUPREME COURT OF HAWAII

JACK THOMAS,
Plaintiff-Appellant/Cross-Appellee,

vs.

JOHN HASSLER, CARLETON REID, and REID RICHARDS & MIYAGI,
Defendants-Appellees/Cross-Appellants,

and

DOES 1-100,
Defendants.

September 18, 2006, Decided

COUNSEL: On the motion:

Charles J. Ferrera, for the plaintiff-appellant Jack Thomas.

JUDGES: By: Moon, C.J., Levinson and Nakayama, JJ., Circuit Judge Ayabe in place of Acoba, J., recused, and Circuit Judge Chang, in place of Duffy, J., recused.

OPINION: ORDER DENYING MOTION FOR RECONSIDERATION

Upon consideration of the motion for reconsideration filed by the plaintiff-appellant Jack Thomas on

September 8, 2006, requesting that this court review its summary disposition order filed on August 30, 2006,

IT IS HEREBY ORDERED that the motion is denied.

DATED: Honolulu, Hawai'i, September 18, 2006.

No. 25475

SUPREME COURT OF HAWAI'I

JACK THOMAS,
Plaintiff-Appellant/Cross-Appellee,

vs.

JOHN HASSLER, CARLETON REID, and REID RICHARDS & MIYAGI,
Defendants-Appellees/Cross-Appellants,

and DOES 1-100,
Defendants.

August 30, 2006, Decided

NOTICE: SUMMARY DISPOSITIONAL ORDERS OF THIS COURT DO NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED. SEE HAWAII RULES OF APPELLATE PROCEDURE FOR GUIDELINES RESTRICTING PUBLICATION AND CITATION OF SUMMARY DISPOSITIONAL ORDERS.

COUNSEL: On the briefs:

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John T. Komeiji, Patsy H. Kirio, and R. Scott Simon (of Watanabe Ing Kawashima & Komeiji), for the defendants-appellees/cross-appellants John Hassler, Carleton Reid, and Reid Richards & Miyagi.

JUDGES: By: Moon, C.J., Levinson, and Nakayama, JJ., Circuit Judge Ayabe in place of Acoba, J., recused, and Circuit Judge Chang, in place of Duffy, J., recused.

OPINION:

SUMMARY DISPOSITION ORDER

The plaintiff-appellant Jack Thomas appeals from the October 23, 2002 judgment of the circuit court of the third circuit, the Honorable Greg K. Nakamura presiding, entered pursuant to the circuit court's grant on the same day of the June 12, 2002 motion for summary judgment filed by the defendants-appellees/cross-appellants John Hassler, Carleton Reid, and Reid Richards & Miyagi law partnership (hereinafter, "the Reid firm") [hereinafter, collectively, "the Appellees"].

On appeal, Thomas argues: (1) that the circuit court erred in granting summary judgment inasmuch as (a) genuine issues of material fact remained with respect to the five alleged misrepresentations, (b) the question of his reliance on the five alleged misrepresentations was for the trier of fact, and (c) the genuine issues of material fact pertaining to the five alleged misrepresentations prevented summary judgment on his derivative emotional distress claim; and (2) that the circuit court erred in denying his motion to amend his second amended complaint.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we resolve Thomas's appeal as follows:

(1) Summary judgment was rightly entered in favor of the Appellees and against Thomas with respect to all five of the alleged misrepresentations.

With regard to the first alleged misrepresentation, the February 7, 1991 letter from Debra Wright, Peter Capriotti's attorney, to Colonial Penn Insurance Company (hereinafter, "Colonial Penn"), Capriotti's insurer, concerned a matter of pending litigation in which the parties shared a common interest in defending against Thomas's tort claim. However, inasmuch as the letter was not made a part of the record, it cannot be determined whether Wright wrote to "a lawyer or a representative of a lawyer" at Colonial Penn and, therefore, whether the privilege of HRE Rule 503(b)(3) applies. Still, the letter qualifies as privileged work product pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 26(b), entitled "Discovery Scope and Limits,"

> which states that [(1) "p]arties []may obtain discovery regarding any matter, not privileged," (emphasis added), and indicates that "[3) n1 discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial" shall be disclosed ["]only upon a showing["] of "substantial need of the materials" and "undue hardship" in obtaining the materials in another fashion.

Save Sunset Beach Coalition, 102 Haw. 465 at 484, 78 P.3d 1 at 20 (emphasis and ellipsis in original) (footnote omitted). The Appellees, therefore, were under no duty to reveal the contents of the letter to Thomas.

Given that the Appellees were not subject to a duty to disclose the contents of the privileged letter, there is no genuine issue of material fact that would support a finding or conclusion that the Appellees acted fraudulently in withholding the letter from Thomas or that they failed to exercise reasonable care or competence in failing to notify Thomas of its contents. *Zanakis-Pico v. Cutter Dodge, Inc., 98 Hawai'i 309, 321, 47 P.3d 1222, 1234 (2002); Shoppe v. Gucci America, Inc., 94 Hawai'i 368, 386, 14 P.3d 1049, 1067 (2000).* Thomas therefore failed to raise any genuine issues of material fact as to any misrepresentations made by the Appellees on the issue of Capriotti's willingness to settle.

With regard to Capriotti's premiums following the June 1, 1988 incident, the alleged statements of Richard Sutton and Capriotti are irrelevant to the matter at hand. If Sutton made his statement when Thomas alleges, he would have been serving as the attorney for Colonial Penn. Capriotti is the underlying tortfeasor in the original action. Neither is a party to the present lawsuit, nor is there any evidence in the record indicating that either is an agent or representative of the Appellees. The hearsay exception set forth in HRE Rule 803(a)(2)(A) and asserted by Thomas is therefore inapplicable. In sum, the record raises no genuine issue of material fact suggesting that the Appellees misrepresented information to Thomas concerning Capriotti's premiums following the June 1, 1988 incident.

With respect to the alteration of the Bowker tape, Thomas admits that he knew that one copy of the tape was "taped over" but insists that Hassler's failure to

inform him that Hassler had "erased" a portion of the tape constituted a misrepresentation upon which he relied. Nevertheless, Thomas's audio expert, Donn Tyler, confirmed in a deposition almost two years before Thomas signed the agreement to arbitrate that he was in possession of an unaltered copy of the tape and a transcript of the interview, which he employed in ascertaining that "three or four sentences" of the copy of the tape in question had been "recorded over."

Furthermore, Thomas fails to articulate any meaningful difference between the terms "recorded over" and "erased."[2] In weighing a motion for summary judgment, "inferences drawn from the evidence must be logical and reasonable," *Wong v. Panis, 7 Haw. App. 414, 418, 772 P.2d 695, 699 (1989)*, abrogated on other grounds by *Hac v. Univ. of Haw., 102 Haw. 92, 73 P.3d 46 (2003)*. No reasonable mind could discern a misrepresentation by the Appellees in comparing Thomas's knowledge that a portion of the copy had been "recorded over" with subsequent information that the portion had been "erased." "When the evidence is so clear that reasonable minds could only come to one conclusion, it is not error for the trial judge to remove the . . . question from the jury and to determine that question as a matter of law." *Parker v. Nakaoka, 68 Haw. 557, 562, 722 P.2d 1028, 1031 (1986)*. See also *Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 108, 839 P.2d 10, 24 (1992)*.

With respect to Thomas's allegation that the Appellees wrongfully withheld the January 21, 1994 letter n3 describing contacts between Capriotti's attorney and the Maui prosecutor's office, the letter, written by Rodney Sisson, Capriotti's counsel, to Colonial Penn

regarding pending litigation in which they shared a common defense interest, was privileged under HRE Rule 503(b)(3), and the circuit court did not abuse its discretion in so ruling. The Appellees were, therefore, under no duty to disclose the contents of the letter to Thomas.[4]

In sum, there is no genuine issue of material fact with respect to whether the Appellees, in withholding from Thomas the contents of the January 21, 1994 letter, acted fraudulently or failed to exercise reasonable care or competence with regards to the information. *Zanakis-Pico, 98 Hawai'i at 321, 47 P.3d at 1234*; *Shoppe, 94 Hawai'i at 386, 14 P.3d at 1067*. Indeed, the Appellees were under a duty to their client at the time, Colonial Penn, not to reveal confidential information such as was contained in the letter.

As for the relationship between the arbitrator, Walter Davis, and the Appellees, any alleged misrepresentations concerning Davis were wholly irrelevant to Thomas's decision to arbitrate, because the record reflects that, at the time Thomas signed the arbitration agreement, Davis had not been selected as the arbitrator; the agreement to arbitrate states in pertinent part that "[i]f the parties cannot agree on the selection of an arbitrator, then [the mediator] is authorized to select an arbitrator." Consequently, had Thomas not consented to Davis as the arbitrator, that decision would not have nullified the agreement to arbitrate and allowed Thomas to proceed to a jury trial. At most, it would have led to the selection of a different arbitrator. Therefore, Thomas's claim for damages on the issue of Davis's relationship with the Appellees appears to be grounded in the notion that, with a

different arbitrator, Thomas would have received a more favorable arbitration award.

In any case, there is no evidence that the Appellees played any role in, or were even aware of, the selection of Davis as the arbitrator, nor does Thomas so allege.[5] Thomas was aware that Sutton had, by December 20, 1995, replaced the Reid firm as the attorney actively representing Colonial Penn and concedes that, thereafter, the Reid firm did not participate as counsel. Moreover, Thomas concedes that Davis was unaware of any continuing involvement of the Reid firm in the matter. Thomas, therefore, fails to point to any evidence in the record raising a genuine issue of material fact as to whether any of the Appellees -- i.e., Hassler, Reid, or the Reid firm -- knew of Davis's selection and breached a duty to Thomas by not informing him, before he signed the agreement to arbitrate, of the precise nature of the professional and financial relationship between Davis and the Appellees.

Furthermore, for Thomas to demonstrate possible reliance, any alleged misrepresentation must have occurred prior to the signing of the arbitration agreement. See *Dement v. Atkins & Ash, 2 Haw. App. 324, 328, 631 P.2d 606, 609 (1981)*. Thomas and Sutton signed the agreement to arbitrate on February 23, 1996. Davis began the arbitration on March 25, 1996. Thomas asserts that Hassler made his statement to Thomas concerning Davis's relationship with the Reid firm on April 26, 1996.[6] Hassler's alleged misrepresentations were made two months after Thomas signed the arbitration agreement, and Thomas himself admits he did not become aware of any reason

to question Hassler's statement until almost three years later.

The record is therefore devoid of any evidence of any misrepresentation or omission on the part of the Appellees upon which Thomas could have relied when he chose, on February 23, 1996, to forego a jury trial in favor of arbitration by an arbitrator as yet to be named.

We hold, therefore, that the grant of summary judgment in favor of the Appellees and against Thomas was correct with regards to the five alleged misrepresentations.[7]

(2) "Although . . .[intentional infliction of emotional distress (]IIED[)] . . . [is an] independent tort[], there still must be some underlying intentional . . . action undertaken by the defendant in order to render the IIED . . . claim cognizable." *Calleon v. Miyagi, 76 Haw. 310, 320, 876 P.2d 1278, 1288 (1994).*[8] Inasmuch as summary judgment in favor of the Appellees was correctly entered with respect to all five alleged misrepresentations, summary judgment as to Thomas's derivative IIED claim was also correctly entered.

(3) The circuit court did not abuse its discretion in denying Thomas's July 22, 2002 motion to amend his second amended complaint. Thomas requested leave to amend his complaint in order to include the allegation that the Appellees wrongfully withheld from him the contents of the February 7, 1991 letter. Inasmuch as the letter was privileged work product, see supra, the Appellees were under no duty to disclose them to Thomas. Thomas's proposed amendment was, therefore, futile. A circuit court "does not abuse its

discretion in refusing leave to amend where such an amendment would be futile." *Fed. Home Loan Mortgage Corp. v. Transamerica Ins. Co., 89 Hawai'i 157, 166, 969 P.2d 1275, 1284 (1998).* Therefore,

IT IS HEREBY ORDERED that the October 23, 2002 judgment of the third circuit court is affirmed.

DATED: Honolulu, Hawai'i, August 30, 2006.

Footnotes

n1 Effective July 1, 2004, this court renumbered paragraph (3) as paragraph (4).

n2 Thomas attempts to craft a distinction by characterizing an "altered" tape as innocent and an "erased" tape as tampered with. Nevertheless, by May 1, 1995, nine months before agreeing to arbitrate, Thomas had already ascribed malicious intent to the "altered" tape.

n3 Thomas's claim of error rests on the Appellees' failure to divulge the contents of the January 21, 1994 letter and the circuit court's ruling that the letter was inadmissible. To the degree that Thomas protests the failure of the Appellees to disclose the mere existence of the letter, however, any failure to do so was harmless. Had Thomas been informed, in response to interrogatories concerning what information Colonial Penn had gathered on the incident, that Sisson had written to Colonial Penn on January 21, 1994, Thomas could have sought a motion to compel production of the letter, requesting the circuit court to make a ruling on

the admissibility of the letter and its contents. The circuit court has, in fact, made such a ruling, discussed infra, correctly concluding that the letter and its contents are privileged. In either case, the Appellees were under no duty to disclose the contents of the letter to Thomas and, therefore, Thomas fails to raise a genuine issue for trial as to any fraudulent or negligent omission on the part of the Appellees that could have effected his choice between arbitration and a jury trial.

n4 Thomas alleges that Sisson's contact with Polak was an illegal invasion of privacy, in violation of *HRS § 846-9* (Supp. 1996), which strictly limits the dissemination of non-conviction-related criminal data, and *HRS § 92F-17(b)* (1993), which provides in relevant part that any individual "who intentionally gains access to . . . a copy of a government record by false pretense, bribery, or theft, with actual knowledge that access is prohibited, or who intentionally obtains any confidential information by false pretense, bribery, or theft, with actual knowledge that it is prohibited [by] a confidentiality statute" is guilty of a misdemeanor. (Brackets in original.) However, the circuit court correctly concluded that the uncontested evidence in the record demonstrates that Sisson did not violate *HRS § 846-9* in that "Sisson was soliciting information from Polak about what an independent witness might have stated. This does not constitute 'nonconviction data' as the term is defined under *HRS § 846-1* [(1993)]." (Emphasis added.) *HRS § 846-1* defines nonconviction data as arrest information without a disposition if an interval of one year has elapsed from the date of arrest and no active prosecution of the charge is pending; or information disclosing that the police have elected not to refer a matter to a

prosecutor, or that a prosecutor has elected not to commence criminal proceedings, or that proceedings have been indefinitely postponed, as well as all acquittals and all dismissals. (Effective July 1, 2006, the legislature amended *HRS § 846-1* through Act 132, § § 1 and 4, in respects immaterial to the present matter.) Similarly, as Sisson's inquiries focused entirely on Polak's recollections as to what Bowker observed on the day of the incident and the record is devoid of any evidence that Sisson gained access to any confidential government records, much less through false pretense, bribery, or theft with actual knowledge that access was prohibited, the circuit court was correct in concluding that Sisson's contacts with Polak did not violate *HRS § 92F-17(b)*. In any case, Thomas fails to demonstrate how Sisson's allegedly illegal activity altered the privileged nature of the letter.

n5 Thomas also concedes that he knew that Davis was a former law partner of Reid's when Thomas signed the agreement to arbitrate on February 23, 1996.

n6 Thomas reiterates other allegations made in earlier affidavits to the effect that "both [] Reid and [] Hassler led [] Thomas to believe that there was no connection, whether professional or financial[,] between [] Davis and [] Reid after 1989" and "Thomas had been specifically told that [] Davis was not affiliated with the firm when [] Thomas's case was being handled by the firm, and was specifically told that [] Davis had no financial connection with the firm after 1989." Apart from the April 26, 1996 statement attributed to Hassler, however, Thomas fails to support his broad assertions with any facts pertaining to the nature of the representations, the identity of the speaker, or the date

upon which the alleged representations were made. In fact, in his opening brief, Thomas seems to admit that he did not discuss the relationship between Davis and Reid with the Appellees at all until sometime after arbitration had begun, stating that "[i]t was at this point [during arbitration under Davis] that [] Thomas began to ask [] Hassler and [] Reid about [] Davis." HRCP Rule 56(e) provides in relevant part: [w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. (Emphases added.) Because Thomas fails to set forth any specific facts pertaining to identifiable misrepresentations apart from Hassler's statement of April 26, 1996, Thomas's claim that the Appellees misrepresented the nature of Davis's professional and financial relationship with the Reid firm rests solely on that statement by Hassler. See *Dairy Rd. Partners v. Island Ins. Co., 92 Hawai'i 398, 412, 992 P.2d 93, 107 (2000)* (citing Rule 56(e)); *Larsen v. Pacesetter Sys., Inc., 74 Haw. 1, 30-31, 837 P.2d 1273, 1288 (1992)* ("[A] plaintiff must state the circumstances constituting fraud or mistake with particularity (e.g., allege who made the false representations) and specify the representations made.") (citing *Ellis v. Crockett, 51 Haw. 45, 59, 451 P.2d 814, 823 (1969)*); *Briggs v. Hotel Corp. of the Pac., 73 Haw. 276, 281, 286, 831 P.2d 1335, 1339, 1341 (1992)* (vague statements void of specific facts were insufficient to raise a genuine issue of material fact in a motion for summary judgment);

Chuck Jones & MacLaren v. Williams, 101 Hawai'i 486, 497, 71 P.3d 437, 448 (App. 2003); Foronda ex rel. Estate of Foronda v. Hawaii Int'l Boxing Club, 96 Hawai'i 51, 58, 25 P.3d 826, 833 (App. 2001).

n7 Inasmuch as summary judgment pertaining to the five misrepresentations is affirmed without any remaining issues pertaining to Thomas's reasonable reliance, Thomas's claim of error on that point need not be addressed. Thomas also fails to include in his statement of the points of error any mention of the civil conspiracy allegation against the Appellees raised in passing in the argument section of his brief and, therefore, pursuant to Hawai'i Rules of Appellate Procedure Rule 28(b)(4), this point is disregarded. In any case, Thomas concedes that civil conspiracy requires an underlying tort, but fails to raise any genuine issues that an underlying tort exists. Finally, inasmuch as we affirm the circuit court's final judgment, this court does not reach the Appellees' cross-appeal.

n8 On appeal, Thomas did not raise any point of error pertaining to the claim of negligent infliction of emotional distress contained in his second amended complaint. It is well settled that, in an action for misrepresentation, "'[t]here may be no recovery for mental anguish and humiliation not intentionally inflicted.'" *Zanakis-Pico, 98 Hawai'i at 320, 47 P.3d at 1233* (quoting *Ellis v. Crockett, 51 Haw. 45, 52, 451 P.2d 814, 820 (1969)).*

CIVIL NO. 98-218 (Hilo)

IN THE CIRCUIT COURT
OFTHE THIRD CIRCUIT
STATE OF HAWAII

(Non-Motor Vehicle Tort)

JACK THOMAS,
Plaintiff-Appellant/Cross-Appellee,

vs.

JOHN HASSLER, CARLETON REID, and REID RICHARDS & MIYAGI,
Defendants-Appellees/Cross-Appellants,

and DOES 1-100,
Defendants.

FINAL JUDGMENT

Defendants John Hassler, Carleton Reid, and Reid Richards & Miyagi's Motion for Summary Judgment, fled on June 12, 2002, was heard by the Court and a decision has been rendered

Pursuant to the ORDER GRANTING DEFENDANTS JOHN HASSLER, CARLETON REID AND REID, RICHARDS & MYAGI'S MOTION FOR SUMMARY JUDGMENT, FILED JUNE 12, 2002 filed on OCT 2 3 2002, final judgment is hereby entered in favor of Defendants, JOHN HASSLER, CARLETON REID, and REID RICHARDS & MIYAGI, and against Plaintiff, JACK

THOMAS as to Counts I through III in the Plaintiff's SECOND AMENDED COMPLAINT.

All other claims, counterclaims, and cross-claims are dismissed.

DATED: Hilo Hawaii OCT 2 3 2002

CIVIL NO. 98-218 (Hilo)

IN THE CIRCUIT COURT
OFTHE THIRD CIRCUIT
STATE OF HAWAII

(Non-Motor Vehicle Tort)

JACK THOMAS,
Plaintiff-Appellant/Cross-Appellee,

vs.

JOHN HASSLER, CARLETON REID, and REID RICHARDS & MIYAGI,
Defendants-Appellees/Cross-Appellants,

and DOES 1-100,
Defendants.

DATE: August 9, 2002

ORDER GRANTING DEFENDANTS JOHN HASSLER, CARLETON REID AND REID, RICHARDS & MIYAGI'S MOTION FOR SUMMARY JUDGMENT FILED JUNE 12 2002 Defendants John Hassler, Carleton Reid and Reid, Richards & Myagi's Motion for Summary Judgment, filed on June 12, 2002, came on for hearing before the Honorable Greg R. Nakramura, on August 9, 2002 at 10:30 a.m.

Plaintiff Jack Thomas was represented by Charles J. Ferrera, and Defendants John Hassler, Carleton Reid and Reid, Richards & Miyagi were represented by John Komeiji. The Court having considered the arguments of

counsel and the memoranda, exhibits and affidavits, and the entire record herein, and good cause appearing therefore.

IT IS HEREBY ORDERED, ADJUDGES AND DECREED that Defendants John Hassler, Carleton Reid and Reid, Richards & Miyagi's Motion for Summary Judgment, filed on June 12, 2002, is hereby GRANTED.

DATED: Hilo, Hawaii, OCT 2 3 2002

Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Seventh Amendment to the United States Constitution

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Fourteenth Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state

shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Hawai'i Revised Statute [§658A-12]

Disclosure by arbitrator. (a) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

(1) A financial or personal interest in the outcome of the arbitration proceeding; and

(2) An existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrator.

(b) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator.

(c) If an arbitrator discloses a fact required by subsection (a) or (b) to be disclosed and a party timely objects to the appointment or continued service of the arbitrator based upon the fact disclosed, the objection may be a ground under section 658A-23(a)(2) for vacating an award made by the arbitrator.

(d) If the arbitrator did not disclose a fact as required by subsection (a) or (b), upon timely objection by a party, the court under section 658A-23(a)(2) may vacate an award.

(e) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under section 658A-23(a)(2).

(f) If the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a motion to vacate an award on that ground under section 658A-23(a)(2). [L 2001, c 265, pt of §1]

Hawai'i Revised Statute [§658A-15]

Arbitration process. (a) An arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration

proceeding before the hearing and, among other matters, determine the admissibility, relevance, materiality, and weight of any evidence.

(b) An arbitrator may decide a request for summary disposition of a claim or particular issue:

(1) If all interested parties agree; or

(2) Upon request of one party to the arbitration proceeding if that party gives notice to all other parties to the proceeding, and the other parties have a reasonable opportunity to respond.

(c) If an arbitrator orders a hearing, the arbitrator shall set a time and place and give notice of the hearing not less than five days before the hearing begins. Unless a party to the arbitration proceeding makes an objection to lack or insufficiency of notice not later than the beginning of the hearing, the party's appearance at the hearing waives the objection. Upon request of a party to the arbitration proceeding and for good cause shown, or upon the arbitrator's own initiative, the arbitrator may adjourn the hearing from time to time as necessary but shall not postpone the hearing to a time later than that fixed by the agreement to arbitrate for making the award unless the parties to the arbitration proceeding consent to a later date. The arbitrator may hear and decide the controversy upon the evidence produced although a party who was duly notified of the arbitration proceeding did not appear. The court, on request, may direct the arbitrator to conduct the hearing promptly and render a timely decision.

(d) At a hearing under subsection (c), a party to the arbitration proceeding has a right to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

(e) If an arbitrator ceases or is unable to act during the arbitration proceeding, a replacement arbitrator shall be appointed in accordance with section 658A-11 to continue the proceeding and to resolve the controversy. [L 2001, c 265, pt of §1]

Hawai'i Revised Statute [§658A-23]

Vacating award. (a) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

(1) The award was procured by corruption, fraud, or other undue means;

(2) There was:

(A) Evident partiality by an arbitrator appointed as a neutral arbitrator;

(B) Corruption by an arbitrator; or

(C) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(3) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 658A-15, so as to prejudice

substantially the rights of a party to the arbitration proceeding;

(4) An arbitrator exceeded the arbitrator's powers;

(5) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under section 658A-15(c) not later than the beginning of the arbitration hearing; or

(6) The arbitration was conducted without proper notice of the initiation of an arbitration as required in section 658A-9 so as to prejudice substantially the rights of a party to the arbitration proceeding.

(b) A motion under this section shall be filed within ninety days after the movant receives notice of the award pursuant to section 658A-19 or within ninety days after the movant receives notice of a modified or corrected award pursuant to section 658A-20, unless the movant alleges that the award was procured by corruption, fraud, or other undue means, in which case the motion shall be made within ninety days after the ground is known or by the exercise of reasonable care would have been known by the movant.

(c) If the court vacates an award on a ground other than that set forth in subsection (a)(5), it may order a rehearing. If the award is vacated on a ground stated in subsection (a)(1) or (2), the rehearing shall be before a new arbitrator. If the award is vacated on a ground stated in subsection (a)(3), (4), or (6), the rehearing may be before the arbitrator who made the award or the arbitrator's successor. The arbitrator shall render the

decision in the rehearing within the same time as that provided in section 658A-19(b) for an award.

(d) If the court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award is pending. [L 2001, c 265, pt of §1]

Hawai'i Rules of Civil Procedure

Rule 56. SUMMARY JUDGMENT.

(a) For claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof. A party seeking recovery under this rule may seek relief at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, provided, however, that a motion seeking relief under this rule shall be served and filed no less than 50 days before the date of the trial unless granted permission by the court and for good cause shown.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof, provided, however, that a motion seeking relief under this rule shall be filed and served no less than 50 days before the date of the trial unless granted permission by the court and for good cause shown.

(c) Motion and proceedings thereon. The motion shall be filed and served not less than 18 days before the date set for the hearing. The adverse party may file and serve opposing memorandum and/or affidavits not less than 8 days before the date set for the hearing. The moving party may file and serve a reply or affidavit not less than 3 days before the date set for the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay,

the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Form of order. Whenever the court on a motion for summary judgment, disposes of one or more but fewer than all claims, involving one or more parties, the order entered must specifically set forth the claim or claims disposed of, and with respect to each such claim, the party or parties in whose favor the disposition is made and the party or parties against whom the disposition is made.

8/23/2002

Circuit Court of the Third Circuit

State of Hawaii

No. 98-218

Thomas v Hessler

Defendants John Hassler, Carleton Reid and Reid, Richards & Miyagi's Motion for Summary Judgment, filed on June 12, 2002 ("Defendants' Motion for Summary Judgment").

Plaintiff Jack Thomas has filed this action seeking damages originally arising out of an accident which occurred on June 1, 1988, in Wailuku, County of Maui, State of Hawaii. Plaintiff alleges that he suffered personal injuries when he was struck by a pickup truck driven by Peter Capriotti ("Capriotti"). At the time of the accident, Capriotti was insured under an insurance policy issued by Colonial Penn Insurance Co. ("Colonial Penn").

Plaintiff brought a civil action for personal injuries against Capriotti in Civil No. 92-0733(2) in the second Circuit Court, State of Hawaii. Also, in Civil No. 92-0733(2), Plaintiff brought a civil action, against Colonial Penn in the Second Circuit Court.

On February 23, 1996,. Plaintiff and Colonial Penn entered into an Agreement to Arbitrate both Plaintiff's

claims for relief against both Capriotti and Colonial Penn. (Exhibit B attached to Defendants' Motion for Summary Judgment.) The Agreement- to Arbitrate was signed by Sheri Carlson and Richard Sutton (Sutton") on behalf of Colonial Penn. Walter Davis ("Davis") was appointed as the arbitrator pursuant to the Agreement to Arbitrate.

On March 25, 1996, the arbitration began. On July 2, 1996, Davis entered his Arbitrator's Award.

The Second Amended Complaint sets forth claims for relief against Defendants John Hassler, Carleton Reid and Reid, Richards & Miyagi. Plaintiff alleges that he relied upon certain misrepresentations made by Defendants Hassler and Reid. Plaintiffs theory is that he entered into the agreement to Arbitrate as a result of these misrepresentations and waived his right to a jury trial. Plaintiff apparently contends that had he proceeded with a jury trial he would have been awarded. damages greater than that set forth in the Arbitrator's Award.

In order to prevail on a claim for relief for fraud or deceit, Plaintiff must show that: (1) a Defendant made a representation, (2) the representation was false, (3) Defendant knew that the representation was false or was without knowledge whether the representation was true or false, (4) Defendant contemplated that Plaintiff would rely on the representation, and (5) Plaintiff relied on the representation. Kang v. Harrington, 59 Haw. 652, 856 (1978).

In addition, in order to succeed on a claim for relief for fraud or deceit, Plaintiff must show that his reliance on

the misrepresentation was justifiable. Restatement of Torts, 2nd, § 537.

Further, under the Restatement of Torts, 2nd, Sec. 538.

(1) Reliance upon a fraudulent misrepresentation is not justifiable unless the matter misrepresented is material.

(2) The matter is material if

(a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or

(b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.

The Court's analyses relating to Plaintiffs specific theories are discussed below.

1. Defendant Hassler had the duty to disclose the existence of the February 7, 1991 letter.

In the Second Amended Complaint, Plaintiff alleges as follows:

10.A. On or about April 7, 1993, Plaintiff's attorney delivered to Defendant Hassler a request for answers to interrogatories. The request included an interrogatory requesting any and all dates of

correspondence received by Colonial from Capriotti or his agent. On or around June 7, 1993, Defendant Hassler responded to this interrogatory on behalf of Colonial and provided a list of correspondence that omitted mention of material correspondence dated February 7, 1991 from Capriotti to Colonial.

Plaintiff contends that Defendant Hassler failed to disclose the existence of the February 7, 1991 and that failure resulted in Plaintiff entering into the Agreement to Arbitrate.

Plaintiff now concedes that there was disclosure of the existence of the February 7, 1991 letter.

As a result, Plaintiffs new theory is that defendant Hassler had the duty to disclose the contents of the letter even though: (1) the discovery master, Professor Addison Bowman, determined that the letter (Document LXI), was privileged under the attorney-client privilege; and (2) Professor Bowman's determinations were affirmed by Judge Shackley F. Raffeto.

Plaintiff argues that defendant Hassler had the ethical duty to disclose to judge Raffeto that Professor Bowman was in error because Professor Bowman had the mistaken belief that Debra K. Wright ("Wright") was representing Colonial Penn.

However, a review of Professor Bowman's analysis (Exhibit J attached to Defendants' Motion for Summary Judgment) does not lead -to the conclusion that Professor Bowman, made a mistake. If anything, his analysis was correct, Wright represented Capriotti.

She sent an obvious confidential communication to Colonial Penn, Capriotti's insurer. Capriotti and Colonial Penn had a common interest in defending against the tort claim made by Plaintiff against Capriotti. Therefore, it is a fair conclusion, as Professor Bowman concluded, that the February 7, 1991 letter was protected under Rule 503(b)(3) of the Hawaii Rules of evidence ("HRE").

As such, as a matter of law, Defendant Hassler did not have a duty to disclose to Judge Raffeto that Professor Bowman erred when he determined. that the February 7, 1991 letter was privileged.

Therefore, partial summary judgment is granted in favor of Defendants and against Plaintiff in regard to this theory.

2. Defendant Hassler failed to disclose that Capriotti's premiums were raised because of the June 1, 1998 accident.

In the Second Amended Complaint, Plaintiff alleges as follows

10.B. In the same interrogatories was an interrogatory asking if Colonial had raised Capriotti's insurance premiums as a result of the June 1, 1988 accident. On or about June 7, 1993, Defendant Hassler, on behalf of Colonial, answered this interrogatory in the negative when in truth the correct answer was in the affirmative.

In order to prevail upon this theory, Plaintiff must prove at trial that Defendant Hassler's purported

representation was in fact false. In other words, Plaintiff must prove that Capriotti's insurance premiums were in fact raised as a result of the June 1, 1988 accident.

However, on their motion for summary judgment, Defendants have the initial burden of production of showing that there are genuine issues of material fact and they are entitled to judgment as a matter of law. GE Capital Hawaii, Inc. v. Miguel, 92 Hawi'i 236, 241 (App. 1999).

Defendants do not bear the ultimate burden of persuasion in this Therefore, under federal procedure, it is not necessary that Defendants create additional materials, such as affidavits which demonstrate the absence of genuine issues of material fact. According to Moore's Federal Practice,

[i]f the movant does not bear the ultimate burden of persuasion on a particular claim at trial, it may satisfy its initial burden [of production] by pointing out that the record lacks substantial evidence to support a necessary element of the nonmovant's claim.

11 Moore's Federal Practice, 3rd., § 56.13[1]

However, it is not clear that this is the case under Hawaii procedure. The rule under Hawaii procedure, without distinction as to which party has the ultimate burden of persuasion, may be that the party moving for summary judgment must meet its burden of production by:

(1) filing an affidavit (a) made on personal knowledge,

(b) setting forth such facts as would be admissible in evidence, and (c) showing affirmatively that the affiant is competent to testify to the matters stated therein; and (2) -attaching thereto or serving therewith sworn or certified copies of all papers or parts thereof referred to in the affidavit.

GE Capital, Hawaii, Inc. v. Miguel, 92 Hawaii 236, 241 (App. 1999).

In support of their motion, defendants have not provided an affidavit setting forth facts which would indicate that Defendant Hassler did not make the alleged representation; or that the representation was true; or that, if the representation were false, Defendant Hassler did not know that it was false.

If Defendants have met their burden of production, then plaintiff has failed to raise a genuine issue of material fact.

As evidence to support his contention that Capriotti's insurance. premiums were in fact raised because of Capriotti's fault in the accident, plaintiff relies upon, first, a statement allegedly made by Sutton. Sutton did not represent Defendants in this case As such, his alleged statement is not admissible as an admission against Defendants under Rule 803(a), HRE.

Second, Plaintiff may argue that statements allegedly made by Capriotti support Plaintiff's contention that Capriotti's insurance premiums were raised as a result of the June 1, 19811 accident. However, Capriotti; was not a representative of defendants and his alleged statements -do not fall within the scope of Rule 803(a),

HRE.

Therefore, they are inadmissible hearsay.

Since there is a question as to whether Defendants have met their burden of production and, if they have, plaintiff has not sustained his burden of showing the existence of a genuine issue of material fact. Defendants shall have 18 days from the date of the transmittal of this advisory to serve and file additional materials in support of their motion for summary judgment and Plaintiff shall have 10 days from the date of service of defendants' materials to serve and file his response.

Therefore, Defendants motion for summary judgment is taken under advisement as to this theory.

3. The erasing of the audiotape.

In the Second Amended Complaint, Plaintiff alleges:

10. C. On or about May 16, 1994, in response to a request for production to Colonial [Penn] from Plaintiffs attorney who had requested the entire audio tape of a telephone conversation between Colonial's adjuster, Crawford & Co., and an eyewitness to the June 1, 1998 accident, Defendant Hassler produced the audio tape representing it to be the entire audio tape, but in fact he had erased up to six minutes of the conversation contained therein.

Plaintiff concedes that prior to entering into the Agreement to Arbitrate, Plaintiff knew that the audiotape was altered, Plaintiff alleges that he did not

know that Defendant Hassler had in fact erased part of the audiotape until after the arbitration had begun. Plaintiff alleges that he "relied upon the accuracy of the tape" which, in part, was used to impeach Julana Bowker ("Bowker").

However, Plaintiff provides no reasonable explanation as to how it made any difference whether the audiotape was "altered" or "erased". In other words, Plaintiff provides no reasonable explanation as to why he would not have gone forward with the arbitration if he knew that the audiotape was "erased" rather than "altered".

The audiotape was apparently used by Plaintiff to impeach Bowker at the arbitration hearing.

Plaintiff makes no claim that because of the erasure of a portion of the audiotape he was so hampered in his impeachment of Bowker at the arbitration hearing that he would have opted for a jury trial.

Plaintiff has not set. forth evidence that Defendant Hassler knew or had reason to know that Plaintiff would not have gone forward with the arbitration if Plaintiff knew that the audiotape was altered rather than erased.

Plaintiff has failed to establish the existence of a genuine issue of material fact as to the issue of whether or not the failure to disclose the erasure was material. Restatement of Torts (2nd), § 538.

As such, Defendants are entitled to partial summary judgment against Plaintiff as to this theory.

4. Contacts with the prosecuting attorney's office.

In the Second Amended Complaint, Plaintiff alleges as follows:

10.D On or around May 16, 1994, in response to further interrogatories to Colonial [Penn] from Plaintiffs attorney which included the interrogatory asking for the dates of any and all contacts with the Maui prosecutor's office concerning any matters relating to Plaintiff, Defendant Hassler omitted from the answer he submitted any mention of (1) a January 21, 1994 telephone contact by [Crawford & Co.] with Deputy Prosecuting Attorney Simone Polak and(2) Colonial's agent Rodney Sissons [sic. "Sisson's] obtaining illegally from Polak information contained in a confidential file in the prosecutor's office.

10. E. In the My 16, 1994 production by Colonial [Penn], Defendant Hassler did not include [the January 1994 Sisson Letter] setting forth a description of the contacts with the Maui prosecutor as described above.

Regarding these allegations, Plaintiff's specific concern is the fact that Defendant Hassler did not disclose the existence of a January 21, 1994 letter written by Rodney Sisson ("Sisson"), Capriotti's attorney in Civil No. 92 -0733(2), to Colonial Penn. (Exhibit PP attached to Defendants' Motion for Summary Judgment), Pars. 36 - 39, Affidavit of Jack Thomas, attached to Plaintiff Jack Thomas' Memorandum in Opposition to Defendants John Hassler, Carleton Reid and Reid, Richards & Miyagi's Motion for Summary Judgment Filed June 12, 2002, filed on August 1, 2002 ("Plaintiff's Memorandum in Opposition").

According to Plaintiff, by 1993, he was aware of a prior contact between Colonial Penn and Simone Polak ("Polak") in 1993 or before. (Exhibit E attached to the Defendants Motion for Summary Judgment.)

Therefore, Plaintiff must be contending that the January 21, 1994 letter contained new information that he did not have prior to the Agreement to Arbitrate which would have caused him to elect a jury trial rather than arbitration.

In reviewing the January 21, 1994. letter, there is no mention of a telephone conversation on January 21, 1994 between Crawford & Co. and Simone Polak ("Polak").

Therefore, there is no proof that such contact actually occurred.

The letter is evidence of 2 conversation Sisson had with Polak. It is summarized as follows;

After some effort, I managed to have Ms. Pollack review the police report and talk to me about her recollections. Unfortunately, she advised that the prosecutor's office had destroyed its records of the case against J.T. Thomas two years after they closed the file the assault charge was barred by the two-year statute of limitations). There is no microfilm or other record to be consulted. Without those records, she is not able to testify in good with that Julana Bowker, told her J. T. Thomas had struck the truck, although she has the impression that this is what happened.

She did say that she has some personal records which

may contain some information about. the Thomas matter, and that she will check them and call me if she finds anything.

First, as a matter of law, the letter was between Capriotti's counsel and Capriotti's insurer, Colonial Penn, and was written for the purpose of providing legal services for Capriotti. Therefore, the letter was protected under Rule 503, HRE and need not have been disclosed to Plaintiff.

Second, Plaintiff concludes that Sisson's interview of Ms. Polak was an invasion of privacy under. HRS §§ 846-9 and 846-16 and HRS §§ 92F-1 4 and 92F-17.

HRS § 84.6-9 restricts dissemination of "nonconviction data". Under HRS Sec. 846-1,:

"Nonconviction data" means arrest information without a disposition if an interval of one year has elapsed from the date of arrest and no active prosecution of the charge is pending; or information disclosing that the police have elected not to refer a matter to a prosecutor, or that a prosecutor has elected not to commence criminal proceedings, or that proceedings have been indefinitely postponed, as all acquittals and dismissals.

In this situation, Sisson was soliciting information from Polak about what an independent witness might have stated. This does not constitute "nonconviction data" as the term is defined under HRS § 846-1.

Therefore, Sisson did not violate HRS 846-9.

HRS §92F-14 restricts the disclosure of a "government record" which constitutes a clearly unwarranted invasion of personal privacy. Under HRS §92F-3, a "government record" means "information maintained by an agency in written, auditory, visual, electronic, or other Physical form." In reviewing the January 21, 1994 letter, it is clear that Sisson's intent was to obtain Polak's recollection of what Bowker might have told her rather than a "government record" or something in physical form.

Further, HRS §92F-17(b) states that.

[a] person who intentionally gains access to or obtains a copy of a government record by false pretense, bribery, or theft, with actual knowledge that access is prohibited, or who intentionally obtains any confidential information by false pretense, bribery or theft, with actual knowledge that it is prohibited [by] a confidentiality statute, shall be guilty of a misdemeanor.

The January 21, 1994 letter is evidence that Sisson did not intentionally try to obtain a government record or confidential information by false pretense, bribery or theft with actual knowledge that access is prohibited. Plaintiff has not provided any evidence that Sisson violated HS §92F-17(b).

Since there is no evidence Sisson violated HRS §846-9 or HRS §92F-17, as a matter of law, no reasonable man would have considered Sisson's conduct in contacting Polak to be important in determining whether to proceed with an arbitration or with a jury trial. Further, Plaintiff has not set forth any admissible

evidence indicating that Defendants knew or had reason to know that Plaintiff regarded or likely regarded Sisson's contact with Polak important in determining whether to proceed with an arbitration or with a jury trial. In other words, any failure to disclose the existence of the January 21, 1994 letter was not material as a matter of law.

As such, Defendants are entitled to partial summary judgment against Plaintiff in regard to, this theory.

5. Walter Davis' Partnership Relationship With Defendants.

In the second Amended Complaint, Plaintiff alleges:

10. G. On or around April 26, 1996, Plaintiff asked defendant Hassler if defendant Reid and Davis were still partners in 1990 and 1991 and had money passed from Reid to Davis from 1991 to 1996 to which Defendant Hassler replied in the negative when in truth Defendant Reid and Davis were still partners in 1990 and 1991 when Colonial [Penn] retained Defendant Reid and his firm in Plaintiff's matter and Davis was receiving money from Defendant RR & M and/or Defendant Reid from 1991 to 1996.

Davis withdrew from Davis, Reid & Richards on or before December 31, 1989. (Exhibit W attached to Defendants' Motion for Summary Judgment.)

Therefore, there was no misrepresentation regarding whether Davis was a partner in Davis, Reid and Richards in 1990 and 1991.

Plaintiffs evidence suggests that Davis may have been engaged in a law practice with Defendant Reid or Defendant Reid, Richards Miyagi after 1989 until 1992 under some arrangement.

Also, there is evidence that Davis received payments from Defendant Reid and Robert Richards for the sale of Davis' partnership interest in Davis, Reid & Richards up until December 31, 1993.

However, as of December 20, 1995, plaintiff's counsel was aware that Reid, Richards and Miyagi was replaced as counsel representing Colonial Penn in Civil No. 92-0733(2) by Richard Sutton ("Sutton").(Exhibit F attached to the Defendants' Motion for Summary Judgment.) Sutton signed the Agreement to Arbitrate for Colonial Penn and not any of the Defendants. The Arbitrator's Award indicated that Sutton represented Colonial Penn. (Exhibit C attached to Defendants' Motion for Summary Judgment.)

Davis stated that he did not know that Defendant Reid or "Reid & Richards was involved in Mr. Thomas' case during the time ... [he] sat as arbitrator on Mr. Thomas' case. (Exhibit 3 attached to Plaintiffs Memorandum in Opposition.) therefore, the evidence is that Defendants did not participate in the arbitration as counsel representing Colonial Penn, even though Defendants might have not formally withdrawn from Civil No. 92-0733(2) until April 26, 1996. Plaintiff has submitted no evidence to the contrary.

As a result, as matter of law, Defendant Hassler's alleged misrepresentations were not material as a matter of law because: (1) a reasonable man would not

have attached importance to the existence or nonexistence of the facts allegedly misrepresented in determining whether to proceed with an arbitration or a jury trial; and (2) there is no evidence that Defendant Hassler knew or had reason to know that Plaintiff regarded or was likely to regard the facts he allegedly misrepresented were important to Plaintiff in determining whether to proceed with an arbitration or jury trial.

Moreover, the evidence also indicates; (1) that, on February 23, 1996, the Agreement to Arbitrate was signed; (2) that, on March 25, 1996, the arbitration began; and (3) that Plaintiff states that, on April 26, 1996, Defendant Hassler made the alleged misrepresentations. As a matter of law, it cannot be said that Plaintiff relied upon the alleged misrepresentation in agreeing to an arbitration when the alleged misrepresentations occurred after Plaintiff agreed to the arbitration and, in fact, the arbitration had actually started.

As such, Defendants are entitled to partial summary Judgment against Plaintiff in regard to this theory.

6. Emotional distress claim.

In light of the above rulings, as a matter of law, it cannot be said that Defendants were unreasonable under the standards set forth under the Restatement of Torts, 2nd, 46, com. d. Wong v. Panis, 7,Haw.App. 414, 419 (1989). Partial summary judgment I granted in favor of Defendants and against Plaintiff in regard to this claim for relief. Although one point raised by Plaintiff in the Second Amended Complaint is taken

under advisement, the court is requesting that Defendants' counsel submit a form of the order as those points upon which the Court has granted partial summary judgment.